

**NO. 49317-9-II**

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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL CLIFFORD BOISSELLE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Jerry Costello

No. 14-1-03503-1

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**Brief of Respondent**

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**Table of Contents**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

1. Whether substantial evidence supports findings of fact III, IV, IX, XVI, XIX, XX, and XXIV. .... 1

2. Whether the trial court properly found that entry of the duplex was justified under the community caretaking exception where the evidence at the CrR 3.6 hearing showed that the deputies responded to reports of a possible dead body and entered solely to determine the welfare of anyone inside the duplex..... 1

3. Was Defendant entitled to defense of felony jury instructions under the law of the case. .... 1

4. Did the trial court properly refuse to give Defendant’s defense of felony jury instructions because those instructions were untimely and prejudiced the prosecution. 1

5. Was the prosecutor’s rebuttal argument fair? ..... 1

B. STATEMENT OF THE CASE..... 1

1. PROCEDURE..... 1

2. FACTS ..... 2

C. ARGUMENT ..... 22

1. THE CHALLENGED FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE..... 22

2. THE WARRANTLESS ENTRY INTO THE DUPLEX WAS LAWFUL UNDER THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT ..... 33

3. THE JURY WAS PROPERLY INSTRUCTED ON SELF DEFENSE..... 54

4.	THE PROSECUTOR'S REBUTTAL ARGUMENT WAS FAIR. ....	60
D.	CONCLUSION.....	66

## Table of Authorities

### State Cases

<i>State v. Acrey</i> , 148 Wn.2d 738, 750, 64 P.3d 594 (2003) .....	39
<i>State v. Alexander</i> , 76 Wn. App. 830, 837-38, 888 P.2d 179 (1995).....	55
<i>State v. Angelos</i> , 86 Wn. App. 253, 254, 936 P.2d 52 (1997), review denied, 133 Wn.2d 1034, 950 P.2d 478 (1998).....	45
<i>State v. Benn</i> , 120 Wn.2d 631, 658, 845 P.2d 289, cert. denied, 114 S. Ct. 382, 126 L. Ed. 2d 331, 62 (1993) .....	57
<i>State v. Brenner</i> , 53 Wn. App. 367, 376, 768 P.2d 509 (1989), reversed on other grounds by <i>State v. Wentz</i> , 149 Wn.2d 342, 68 P.3d 282 (2003).....	56, 57, 58
<i>State v. Brightman</i> , 155 Wn.2d 506, 523, 122 P.3d 150 (2005).....	58, 62
<i>State v. Gibson</i> , 104 Wn. App. 792, 795, 17 P.3d 635 (2001) .....	45
<i>State v. Gocken</i> , 71 Wn. App. 267, 269, 857 P.2d 1074 (1993), review denied, 123 Wn.2d 1024, 875 P.2d 635 (1994).....	42, 43, 44, 45
<i>State v. Griffith</i> , 91 Wn.2d 572, 576, 589 P.2d 799 (1979) .....	56
<i>State v. Hill</i> , 123 Wn.2d 641, 647, 870 P.2d 313 (1994) .....	22, 59
<i>State v. Hos</i> , 154 Wn. App. 238, 246-247, 225 P.3d 389 (2010).....	40, 41, 43
<i>State v. Johnson</i> , 104 Wn. App. 409, 16 P.3d 680 (2001).....	34, 41, 45
<i>State v. Johnson</i> , 128 Wn.2d 431, 443, 909 P.2d 293 (1996).....	23
<i>State v. Kinzy</i> , 141 Wn.2d 373, 387, 5 P.3d 668 (2000).....	34, 37, 38, 39, 42, 51, 52, 53
<i>State v. Lawson</i> , 135 Wn. App. 430, 432-434, 144 P.3d 377 (2006).....	41

<i>State v. Leupp</i> , 96 Wn. App. 324, 326, 980 P.2d 765 (1999), review denied, 139 Wn.2d 1018, 994 P.2d 849 (2000).....	45
<i>State v. Link</i> , 136 Wn. App. 685, 696, 150 P.3d 610 (2007) .....	52
<i>State v. Lynd</i> , 54 Wn. App. 18, 19, 771 P.2d 770 (1989) .....	45
<i>State v. Menz</i> , 75 Wn. App. 351, 352-355, 880 P.2d 48 (1994).....	43, 45
<i>State v. Nyland</i> , 47 Wn.2d 240, 243, 287 P.2d 345 (1955).....	56, 58
<i>State v. Russell</i> , 125 Wn.2d 87, 882 P.2d 747 (1994).....	60
<i>State v. Schlieker</i> , 115 Wn. App. 264, 267-268, 62 P.3d 520 (2003) .....	52
<i>State v. Schroeder</i> , 109 Wn. App. 30, 39, 32 P.3d 1022, 1026 (2001) ....	45
<i>State v. Schultz</i> , 170 Wn.2d 746, 754, 248 P.3d 484 (2011).....	37, 38
<i>State v. Smith</i> , 177 Wn.2d 533, 541, 303 P.3d 1047 (2013).....	34, 37, 38, 40
<i>State v. Stewart</i> , 141 Wn. App. 791, 794, P.3d 111 (2007) .....	22
<i>State v. Swenson</i> , 59 Wn. App. 586, 589, 799 P.2d 1188 (1990) .....	35
<i>State v. Thompson</i> , 151 Wn.2d 793, 802, 92 P.3d 228 (2004).....	34, 37, 38, 40, 41, 51
<i>State v. Weller</i> , 185 Wn. App. 913, 344 P.3d 695 (2015) .....	52
<i>State v. Williams</i> , 148 Wn. App. 678, 201 P.3d 371 (2009) .....	34, 43, 51

Federal and Other Jurisdictions

*Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948,  
164 L. Ed. 2d 650 (2006)..... 39, 40

*Cady v. Dombrowski*, 413 U.S. 433, 447–448, 93 S. Ct. 2523,  
37 L. Ed. 2d 706 (1973)..... 37, 39, 51

*Commonwealth v. Townsend*, 453 Mass. 413, 427,  
902 N.E.2d 388 (2009)..... 46

*Corrigan v. District of Columbia*, 841 F.3d 1022,  
1034 (D.C. Cir. 2016) ..... 46

*Johnson v. State*, 386 So.2d 302 (Fla.App.1980) ..... 49

*People v. Ray*, 21 Cal. 4th 464, 471, 981 P.2d 928, 933,  
88 Cal. Rptr. 2d 1, 6–7 (1999) ..... 35, 54

*Rasucher v. State*, 129 S.W.3d 714, 723 (2004) ..... 50

*U.S. v. Stafford*, 416 F.3d 1068, 1074,  
05 Cal. Daily Op. Serv. 6831 (2005) ..... 47, 50

*United States v. Gwinn*, 219 F.3d 326 (4th Cir. 2000)..... 43

*United States v. Hogue*, 283 F.Supp. 846, 848-49 (N.D.Ga. 1968).... 48-49

*United States v. Holloway*, 290 F.3d 1331, 1336 (11th Cir.2002)..... 48

*United States v. Richardson*, 208 F.3d 626, 627-31 (7th Cir.2000) .. 48, 49

*United States v. Salava*, 978 F.2d 320, 324-25 (7th Cir.1992) ..... 48

Constitutional Provisions

Article 1, § 7, Washington Constitution ..... 33, 37, 39, 40, 41

Fourth Amendment, United States Constitution..... 33, 34, 36, 37, 39, 40

**Statutes**

RCW 9A.16.050(2)..... 58

**Rules and Regulations**

CrR 3.6..... 1

CrR 6.15(a) ..... 59

**Other Authorities**

Mary Elisabeth Naumann, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 Am. J. Crim. L. 325, 333 (1999)..... 34-35, 36

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether substantial evidence supports findings of fact III, IV, IX, XVI, XIX, XX, and XXIV.
2. Whether the trial court properly found that entry of the duplex was justified under the community caretaking exception where the evidence at the CrR 3.6 hearing showed that the deputies responded to reports of a possible dead body and entered solely to determine the welfare of anyone inside the duplex.
3. Was Defendant entitled to defense of felony jury instructions under the law of the case.
4. Did the trial court properly refuse to give Defendant's defense of felony jury instructions because those instructions were untimely and prejudiced the prosecution.
5. Was the prosecutor's rebuttal argument fair?

B. STATEMENT OF THE CASE

1. Procedure

Defendant was charged by amended information with one count of murder in the first degree with a firearm enhancement and one count of unlawful possession of a firearm in the second degree. CP 4-5.

Pretrial, Defendant moved to suppress Brandon Zomalt's dead body found during a warrantless health and welfare check of Defendant's duplex. CP 7-15. The trial court denied the motion to suppress evidence, finding that the officers lawfully entered the duplex to check the health and safety of both Defendant and Zomalt. CP 42.

On May 19, 2016, after the defense rested its case, Defendant proposed self defense jury instructions based upon actual defense of a felony. CP 321-22.<sup>1</sup> Those instructions were denied. CP 325; 10 VRP 1528.

Following trial, Defendant was found guilty of murder in the second degree with a firearm enhancement, felony murder in the second degree with a firearm enhancement, and unlawful possession of a firearm in the second degree. CP 135-142. The two second degree murder charges were merged into Count I. CP 318-19. Defendant was sentenced to 260 months in confinement. CP 18-22. Defendant filed a timely notice of appeal on June 30, 2016. CP 331.

2. Facts

a. Facts Pertaining to the Motion to Suppress the Dead Body of Brandon Zomalt.

On September 1, 2014, an anonymous male made two calls to law enforcement. 1 VRP 24. He first reported to South Sound 911 that his friend “Mike” said he shot someone at Unit B of a duplex located at 13009 Military Rd E. in Puyallup, “possibly killed him,” and that “it was self-defense.” 1 VRP 61-65. His second call reported to the Puyallup PD tip

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<sup>1</sup> The findings of fact in the “Order Denying Self-Defense Instructions Based on Untimely New Theory” have not been challenged on appeal. They are referenced here.

line that there was a “possible dead body” at the same address. 1 VRP 24, 61-66. As a result of those calls, Pierce Co. Sheriff’s Deputies were dispatched to the duplex. 1 VRP 23-24, 126.

Dep. Ryan Olivarez and Dep. Fredrick Wiggins arrived on the scene first. 1 VRP 24. They were dispatched to conduct a welfare check and to determine if someone inside the duplex needed help. 1 VRP 62, 127, 139, 225-227.

The deputies attempted to contact someone inside the duplex by knocking on the door, but received no response. 1 VRP 128-29. They did, however, hear a dog barking aggressively. 1 VRP 128-129, 228. They then walked around the outside of the duplex and found all of the entrances secure, with all windows closed and covered with blinds. 1 VRP 226, 229. Dep. Wiggins noticed a medium sized dog inside the home that followed him as he walked around the property. 1 VRP 130, 135. The dog aggressively barked and charged at the doors and windows as he checked the premises. 1 VRP 135. As he walked around the property, Dep. Wiggins smelled a “foul odor” of possibly “bleach or urine” that he attributed to the dog he saw in the house. 1 VRP 227. Dep. Olivarez also noted an odor surrounding the house, coming from the garage in particular. 1 VRP 131. Based on everything he knew at the

time, Dep. Wiggins thought there was “potentially” a body inside the duplex. 1 VRP 233.

Based on this information, Dep. Olivarez contacted Sgt. Erik Clarkson and advised him that something was “not right” at the duplex. 1 VRP 131. Based on everything he knew at the time, Dep. Olivarez did not believe they should leave without entering the duplex to conduct a welfare check of the duplex residents. 1 VRP 139-141.

Dep. Olivarez and Dep. Wiggins attempted to gather more information on the duplex by contacting neighbors. 1 VRP 90, 228. One neighbor told Dep. Wiggins that he saw nobody come in or out of the duplex in “about a week,” which was unusual. 1 VRP 90. Another neighbor told Dep. Olivarez that there was usually a lot of foot traffic coming and going from the duplex. 1 VRP 34, 131. That neighbor said that nobody was seen at the home in “about a week,” and the dog had not been out during that time. 1 VRP 33-34, 90-91. He also said he thought a black male named Michael lived in Unit B of the duplex. 1 VRP 34, 51.

Sgt. Christopher Adamson arrived at the scene next. 1 VRP 25, 88. Before he arrived, Adamson listened to both the South Sound 911 call and the Puyallup PD call indicating a possible dead body at the duplex. 1 VRP 108. Upon arriving at the duplex, his intent was to determine whether they could find any evidence at the duplex to support the

anonymous 911 calls. 1 VRP 88-89. Based on the nature of the information provided in the call, he worried about whether someone was dead or dying in the house. 1 VRP 89. Sgt. Adamson was briefed by the deputies at the scene about their observations and contact with neighbors prior to his arrival. 1 VRP 90. Sgt. Adamson proceeded to walk around and observe the duplex. 1 VRP 89. He intended to confirm, before entering the duplex, whether there was a victim of violence inside, either dead or alive. 1 VRP 89. As he walked around the property, Sgt. Adamson smelled a foul odor that was “consistent with a decaying body,” and “heavily masked with large quantities of garbage.” 1 VRP 97.

Sgt. Adamson directed the patrol deputies to perform certain tasks in order to gain more information. 1 VRP 92. Dep. Olivarez identified and contacted the property owner of the duplex, Kevin Tofstad. Dep. Olivarez attempted to determine if Tofstad could consent to entry of the duplex. 1 VRP 42, 92. During that call, Dep. Olivarez learned that Unit B was rented to a female named Lola Patterson, who abandoned the duplex without notifying him, and that her son, “Michael,” was still living there. *Id.* While he tried to get Michael to pay rent, Michael never did so, forcing him to file bankruptcy on the property. 1 VRP 42. Tofstad did not know the status of Michael or who was in the house at the time. 1 VRP

92. Based on that information, Sgt. Adamson did not believe Tofstad could provide valid consent to enter the duplex. 1 VRP 92.

Dep. Wiggins ran the plates of two cars located in the driveway of the duplex through the Dept. of Licensing and learned that Lola Patterson was the registered owner of both vehicles. 1 VRP 41. Dep. Wiggins attempted to contact Patterson via telephone. 1 VRP 190-191. As Patterson's last known address was close to the duplex, Dep. Wiggins drove to the location and contacted her personally. 1 VRP 92-93; 2 VRP 229. She told Wiggins that she had not seen or heard from Mike in about three days. 1 VRP 93. However, this information was not relayed to the sergeants until after they entered the home. 1 VRP 41.

Sgt. Erik Clarkson was last to arrive at the scene. 1 VRP 24. When he arrived, the deputies and Sgt. Adamson were walking around the duplex attempting to look inside. 1 VRP 27. Sgt. Clarkson was briefed by the deputies and walked around the property to assess the situation. 1 VRP 27. As he walked up to the garage, he smelled a "really bad odor" that "might be rotting garbage, or something like that." 1 VRP 29.

Sgt. Clarkson proceeded to the back of the duplex to try and view the inside of the home from the back. 1 VRP 29. When Sgt. Clarkson attempted to look inside the house from the back slider door, the dog aggressively attacked the window, briefly moving the vertical blinds aside

and allowing visibility into the home. 1 VRP 29-30. When looking inside, Sgt. Clarkson was able to discern a living room with overturned furniture. 1 VRP 31. Based on the dog's aggressiveness, Sgt. Clarkson determined early on that animal control should be contacted. 1 VRP 43. Sgt. Clarkson decided to force entry into the house, with or without a warrant, for the abandoned dog's safety and well-being, as authorized by statute. 1 VRP 112.

Sgt. Clarkson also noticed a man across the street who appeared interested in the deputies' activities. 1 VRP 34, 67. The man was contacted and identified as Christopher Williamson, a friend of Brandon Zomalt. 1 VRP 35, 67-68. Williamson told Adamson that Brandon was staying in the duplex with "Michael," and he last saw Brandon a month earlier but had not seen or heard from Brandon since then. 1 VRP 34-35, 230-231. Williamson also wanted to know if the deputies had "details of his location of his body." Exhibit 12; 2 VRP 230.

During the ongoing investigation, Sgt. Clarkson received a brief<sup>2</sup> call from Auburn PD Detective Faini, who was investigating a missing person and potential homicide case concerning Brandon Zomalt. 1 VRP 36-39. Sgt. Clarkson was not sure how he ended up in contact with Det.

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<sup>2</sup> "The call was pretty brief." 1 VRP 37.

Faini, except that he received a call from him. 1 VRP 36. Det. Faini advised Sgt. Clarkson that the welfare check could be related to a missing person/possible homicide case he was working on based on the carpet burning incident in Auburn and that Brandon Zomalt was a possible victim. 1 VRP 37-38. He also told Sgt. Clarkson he was interested in knowing if any carpeting was missing from the duplex. VRP 36. Det. Faini did not give Sgt. Clarkson an opinion that Zomalt was a crime victim or actually deceased. 1 VRP 37. Sgt. Clarkson was not aware of the ripped up carpet in the duplex at the time of the conversation. 1 VRP 38-39.

At that time, Auburn Police Department was investigating a suspicious roadside burning involving a bullet, burned flooring materials, and much blood soaked material. Sgt. Clarkson was not aware of that information before he arrived upon the scene. 1 VRP 32. What he learned at the scene is related in the preceding paragraph. Sgt. Adamson knew that Brandon Zomalt was associated by DNA evidence with that roadside burning. 1 VRP 110. Deputy Olivarez was not aware of the Auburn P.D. information. 1 VRP 133-34. Nor was Deputy Wiggins. 2 VRP 232-33.

After Sgt. Clarkson ended the call with Det. Faini, Sgt. Adamson informed Sgt. Clarkson that when he walked around the back of the

duplex, the dog moved the blinds from the inside. 1 VRP 37-39. Sgt. Adamson could then see ripped up carpet missing in the living room. *Id.*

Sgt. Adamson also individually determined some information. 1 VRP 90. He spoke with a neighbor who believed the occupant of Unit B was a sex offender named Michael Boisselle. 1 VRP 91. Several entries in the CAD log prior to entry of the duplex listed Michael Boisselle as not living that at that address anymore with location unknown. 1 VRP 79-80. After confirming the duplex as Boisselle's last known address, Sgt. Adamson called the listed phone number for Boisselle, but it went to voicemail. 1 VRP 114-15. Sgt. Adamson left a voice message, which was not returned. 1 VRP 115. He determined that there had been no activity at the house for several days. 1 VRP 116. Based on everything he knew at the time, Sgt. Adamson determined that both Zomalt and Boisselle could be potential victims in need of assistance. 1 VRP 115-116.

The deputies took over an hour to enter the residence so they could gather information to confirm or refute the information in the 911 call. 1 VRP 46. None of the information gathered prior to their entry confirmed that "Mike" or Zomalt was alive or safe. 1 VRP 97. None of the four deputies believed they had probable cause to get a warrant as they did not have sufficient evidence to conclude any crime occurred inside the duplex

or to identify any person as a suspect thought to have committed any crime. 1 VRP 32, 39-40, 45-46, 105-106. Both the sergeants and deputies believed that turning around and leaving was not a legitimate option based on the public expectation and duty to make sure that people are safe. 1 VRP 97. Sgt. Clarkson told Dep. Olivarez that they might have to force entry into the duplex to conduct a “welfare check” of the residents. 1 VRP 138-139.

Based on the anonymous 911 calls, the foul odor surrounding the house, the neighbors’ accounts that nobody was seen coming or going from the duplex for the past week and that the dog did not go outside for a week, Det. Faini’s information that Zomalt’s DNA found on burned carpet debris, Williamson’s indication that Zomalt was living at the duplex at that time, the ripped up carpet and overturned furniture in the duplex, and the officer’s inability to locate or contact Zomalt or “Mike,” the sergeants determined that they had no other option than to enter the residence to determine the welfare of “Mike,” Zomalt, and the dog. 1 VRP 117.

Sgt. Adamson and Sgt. Clarkson jointly made the final decision to force entry into the duplex. 1 VRP 44-47. The deputies broke through the front door, and an animal control officer secured the dog and took it outside. 1 VRP 49-50. Once inside, they collectively checked the upper and lower level of the duplex, only looking inside any space big enough to

hold a person, either alive or dead. 1 VRP 49-52. They did not find any person, but did notice a number of piles of dog feces and urine stained areas of carpet in one of the upstairs bedrooms. 1 VRP 52. The smell from the garage wall was permeating throughout the house. 1 VRP 52-53. While searching the duplex, none of the deputies looked for or collected any physical evidence. 1 VRP 100.

The deputies then moved towards the attached garage from inside of the duplex. 1 VRP 54. As they opened the door, they spilled an open bottle of bleach that was in the garage. 1 VRP 54. The garage was extremely cluttered, and deputies noted the foul odor was strongest in the garage. 1 VRP 102. Deputy Clarkson saw, but could not access, a large rolled-up carpet or rug that was near the automatic car entry door. 1 VRP 54-55. Sgt. Clarkson noted that the rug had something inside it. 1 VRP 55. He spotted a shoe and a large mass of maggots pouring out of the carpet. VRP 55-56. The deputies activated the automatic “car entry” door and backtracked through the house to the front of the garage. 1 VRP 56-57.

Once there, the deputies saw what was clearly an arm sticking out of the carpet. 1 VRP 56. Based on the condition of the arm, the odor, and the maggot activity, they concluded the person inside the carpet was dead and had been for quite some time. 1 VRP 57-58. Based on the way the

body was rolled up inside the carpet, the deputies concluded the person inside was dead as a result of a homicide, not a suicide, and sealed off what they determined was now a crime scene. 1 VRP 58-59.

b. Facts Pertaining to Self-Defense, in the Light Most Favorable to Defendant.

Defendant first met Brandon Zomalt in the Summer of 2007. 8 VRP 1345. He would see Mr. Zomalt once in awhile, not very often. 8 VRP 1347. He had met Mr. Zomalt's mother, but none of the other people in Mr. Zomalt's life. *Id.* Mr. Zomalt liked to feud and debate with people. 8 VRP 1349. Mr. Zomalt argued a lot. *Id.* Mr. Zomalt got into fights. *Id.* Mr. Zomalt would always have some type of issue with everyone he was around. *Id.* Defendant learned from Mr. Zomalt that he fought a lot. "He would beat people up a lot. He pretty much was very domineering towards a lot of people. I mean, these are just the things that he would talk to me about, you know. There was always something going on." 8 VRP 1350.

Mr. Zomalt had told Defendant that he had beaten a guy until he went into convulsions, that he had stabbed a guy, that he had gotten into fights at parks and bars, that he had beaten up his girlfriend a few times, and that he had shot at a guy before. 9 VRP 1387. Mr. Zomalt told him that both mothers of his children, his mother, the sister of one of those

mothers, and a boyfriend of the younger sister of the baby's mother had all gotten protection orders against him. 9 VRP 1387-88. Mr. Zomalt also told Defendant that he had gotten a harassment charge for threatening to kill someone the year before the killing. 9 VRP 1388. Mr. Zomalt brought Hillary, the mother of Mr. Zomalt's last child, over to his house a couple of times per week over the Summer. 9 VRP 1379. Mr. Zomalt would sometimes yell at Hillary in heated conversations. *Id.*

In the Summer of 2014, Defendant had not seen Mr. Zomalt for about a year and a half. 9 VRP 1380. Defendant met up with Mr. Zomalt sometime in between the fourth and twenty-third of July, 2014. 9 VRP 1381. Defendant ran into Mr. Zomalt in the Mall and learned Mr. Zomalt was homeless. *Id.* Defendant helped Mr. Zomalt get a food handler's card. *Id.* Defendant invited Mr. Zomalt to stay at his house. 9 VRP 1382. The "discussion" or "plan" was that Mr. Zomalt would stay at Defendant's house for a month and a half, possibly two months, to get on his feet. 9 VRP 1382-83. Defendant did not ask Mr. Zomalt for rent. *Id.*

Mr. Zomalt held a job for only about a week. 9 VRP 1383-84. He was fired because he pushed someone at work. 9 VRP 1384. Mr. Zomalt drank really potent beer from sun up to sun down—all day long, everyday. 9 VRP 1385. Drinking made Mr. Zomalt this totally different person. 9 VRP 1386. "He would get really hyped up and sort of antsy, like

adrenaline was running through him all the time, and he would get angry really fast, and then he would want to fight.” 9 VRP 1386. There were no physical fights, because Defendant would avoid Mr. Zomalt. *Id.* Mr. Zomalt was also using drugs—methamphetamine. *Id.* Mr. Zomalt never touched Defendant in a hostile way. 9 VRP 1410. Defendant did not consider Mr. Zomalt to be a jerk; he considered him to be a friend. 9 VRP 1411.

Defendant told Mr. Zomalt he had to go maybe at the beginning of August. 9 VRP 1387. After a conversation, Defendant gave him another chance. 9 VRP 1389.

After that, the anger continued. *Id.* The fighting with Hillary continued. *Id.* Mr. Zomalt starting following Defendant when Defendant would leave the house and would show up in places away from the house when Defendant was trying to get away from Mr. Zomalt for the day. *Id.* The Defendant related:

One night I woke up in the middle of the night, and I don't know what woke me up, but something just woke me up and I looked over and he is standing right pretty much above my bed. My bed is a big bed, so it covers most of the bedroom and he's kind of in the doorway in the beginning of the doorway standing there. I asked him what are you doing. And he said, I was going to ask you something, but never mind, and he turned around and walked downstairs.

9 VRP 1390.

On the day that Defendant shot Mr. Zomalt, Mr. Zomalt had been drinking early, and the arguing started right away. *Id.* Defendant walked to the store at about eleven in the morning; Mr. Zomalt followed him there. *Id.* Mr. Zomalt was really drunk and Defendant thought he “just wanted the argument to keep going.” 9 VRP 1390-91. After he got back from the store, Defendant hung out in his backyard and in his room, avoiding Mr. Zomalt. 9 VRP 1391. Defendant told Mr. Zomalt he had to leave:

Yeah. All day, you need to leave my house. Why don't you leave, you know. All day long that was the subject and that was why he was so angry, because he could tell that was the day that I really -- it was over. There was no changing my mind. He had to go. He had to leave my house that day.

*Id.*

He refused to leave. He said no, he doesn't leave. Make me. I don't have to. You need to make me leave. So I'm up in my room and I'm yelling from my room, he's yelling up to my room, you need -- that's where the argument is going on. You need to go. And he's refusing to go. And being very reviling, calling all kind of names and saying terrible things. I am telling him he has to go. I'm going to find a way to go. And finally, this is what I was trying to avoid the whole time, I didn't want to get him in trouble, but finally I said, I'm going to have to call the cops. That's what I didn't want to do, because I knew he had been in a lot of trouble before. I didn't want to have to send him to jail, or get him in any kind of trouble like that. I just was hoping that he would leave. So that was the last thing I could do.

There was nothing else I could do to get him out of my house, and so I had to tell him I had to call the police on him.

9 VRP 1392.

Yeah, he said make me. He said, well -- he said make me. When I said, you got to leave. When I said, I'm going to go call the police, I grabbed a jacket, I came walking downstairs, and that's when the gun was in my face. He said, I bet you won't make it out that door.

9 VRP 1393. This happened around 11:00 or 12:00 at night. 9 VRP 1393.

Defendant then turned around and went back up to his room.<sup>3</sup> *Id.*

The arguing continued. *Id.* Defendant looked over the rail, to downstairs, and saw the gun sitting on the arm of the couch. 9 VRP 1394. Mr. Zomalt was seated on the love seat. 9 VRP 1394. Defendant went downstairs to the kitchen, with the intent to get the gun. *Id.*

At this point in time, Defendant thought:

No [he wasn't saying anything to me at that time], because I assumed he just figured I was in the kitchen getting me something to drink, and that he had pretty much won that argument, and there was nothing I was going to do.

9 VRP 1394. Mr. Zomalt was not threatening at that time. 9 VRP 1433.

So what I did after I opened that refrigerator up, I looked around the corner, saw the gun still on the arm of the couch, or on the arm of the love seat, because the love seat is back up against the kitchen wall. So I grabbed the gun and started running up the stairs.

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<sup>3</sup> It is not clear from defendant's testimony how long he was in his room. 9 VRP 1393-94.

9 VRP 1395. Defendant ran to get away from Mr. Zomalt. *Id.* Defendant had a choice—run out the front door, or run up the stairs. 9 VRP 1445. Defendant chose to run up the stairs. *Id.* Defendant started running up the stairs. 9 VRP 1395.

Mr. Zomalt stood up, turned and started coming in Defendant's direction. 9 VRP 1395. Defendant turned and fired a few times, at a distance of from the love seat to the stairs. 9 VRP 1395. Defendant fired until Mr. Zomalt hit the ground, until he fell. *Id.*; 9 VRP 1414-15. As Defendant was shooting Mr. Zomalt, he thought: "Don't let him get to me and take the gun away from me and kill me." 9 VRP 1403-04. Defendant was scared to death. 9 VRP 1468. "Scared of death and from dying and from not dying, hoping that I wouldn't die." 9 VRP 1468. Defendant was "just shooting to stop the threat." 9 VRP 1468.

At the time of the shooting, Mr. Zomalt was unarmed. 9 VRP 1429. Mr. Zomalt fell at the foot of the stairs—just more than arm's reach away from Defendant. 9 VRP 1482. Nobody else shot Mr. Zomalt. 9 VRP 1415. All the shots came out of the gun in like three seconds, or within a couple of seconds. 9 VRP 1468; 9 VRP 1489.<sup>4</sup>

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<sup>4</sup> See also 9 VRP 1488, which seems to suggest that the shots came out of the gun as fast as defendant could pull the trigger.

It is not entirely clear whether Defendant was running or standing when he shot Mr. Zomalt. At one point he testified “I was standing -- I was running up the stairs.” 9 VRP 1490. At another point: “What I did was run towards those stairs, turned around and fire as many times as it took until he fell.” 9 VRP 1490. And another: “No, I'm standing still.” 9 VRP 1498.

c. Facts Relevant to Rebuttal Argument.

Defendant shot Brandon Zomalt to death. 9 VRP 1415-16; 6 VRP 922. Mr. Zomalt suffered five gunshot wounds: three shots to the head,<sup>5</sup> one shot that ended up in his thigh (near the hip),<sup>6</sup> and another shot that ended up in his pelvis.<sup>7</sup> The wounds to the thigh and pelvis were potentially lethal, but not necessarily lethal. 6 VRP 872. The wound to the thigh entered sort of in the “bathing suit distribution area. *Id.* The wound to the pelvis entered in the lateral side of the body. 6 VRP 873.

One bullet to the head entered virtually on top of the head and came out the right eye. 6 VRP 900. This was the first head shot. 6 VRP 900. The direction of that shot was from back left to right front. 6 VRP 906. The gun that fired that shot actually touched Mr. Zomalt’s scalp. 6

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<sup>5</sup> 6 VRP 867.

<sup>6</sup> 6 VRP 868-69.

<sup>7</sup> *Id.*

VRP 906-07. The first shot to the head immediately incapacitated Mr. Zomalt. 6 VRP 901. Mr. Zomalt should have collapsed right away. *Id.* But Mr. Zomalt would not have died right away. 6 VRP 913. That would have taken minutes. *Id.*

The two succeeding bullets each went into the skull, both next to each other, near the top of the left ear, and came out roughly under the cheekbone. 6 VRP 900. The two “wound paths may have actually overlapped a little bit, crossed a little bit, or have been parallel.” 6 VRP 922.

Each of the three wounds to the head was a contact wound. 6 VRP 903. The medical examiner had no doubt that each of the wounds to the head was a contact wound.

There's no question in my mind. That is as close to certain as you get in terms of distance in this particular scenario with the soot on the bone.

9 VRP 1529.

Brandon Zomalt's mother, who talked with Mr. Zomalt every other day,<sup>8</sup> spoke with him on August 12, when he confirmed an appointment with her the next day. 4 VRP 523. After August 12, Mr. Zomalt's mother never talked to Mr. Zomalt again. 4 VRP 524.

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<sup>8</sup> 4 VRP 521.

The entire carpet and the carpet pad in the living room of Defendant's house had been torn out sometime in August, 2014, when Julia Pendleton visited Defendant at his house and met Brandon Zomalt<sup>9</sup> and later that month when Ms. Pendleton again visited the house on August 26.<sup>10</sup> Defendant denied that the carpet pad and carpet had recently been ripped up. 9 VRP 1438. Defendant disputed that; he claimed he had been working on the floor all summer. *Id.* Defendant admitted that the unfortunately deceased body of Brandon Zomalt was in Defendant's garage during Ms. Pendleton's August 26, 2014 visit. 9 VRP 1440.

On August 13, 2014, at about 3:00 p.m. Sacha Ziegler was commuting home from work when she saw an SUV parked on the side of the road with the back door up and cleaning supplies visible. 4 VRP 534. She saw a person come up the embankment and stand near the back passenger side of the vehicle. 4 VRP 534. The person was wearing blue surgical type gloves. *Id.* Defendant was that person. 4 VRP 536; 9 VRP 535. Mishioka Maave stopped near the SUV and Defendant saw "a little bit of fire but a lot of smoke." 4 VRP 540. Luis Lopez, another passerby,

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<sup>9</sup> 6 VRP 904. Ms. Pendleton said that this visit happened about three weeks before the August 26 visit, and likely in August. 6 VRP 985.

<sup>10</sup> 6 VRP 985. This visit was dated via two receipts (from Wendy's Restaurant and Rite Aid) in a bag left on a table in defendant's residence that Ms. Pendleton recognized. 6 VRP 983-84. On cross examination defendant agreed (after initially disputing) that Ms. Pendleton had visited him at the house on August 26. 9 VRP 1439.

stopped and put out the fire. 4 VRP 546. Mr. Lopez saw a person (he did not identify the Defendant) jump into the SUV and drive away. 4 VRP 547. Mr. Lopez, a law enforcement officer, thought there was something not natural about the behavior and unsuccessfully attempted to follow the SUV. 4 VRP 547. Mr. Lopez returned to the burn site and waited for the fire department and the police to arrive. 4 VRP 547-48.

Among the items found at the Peasley Canyon Rd. fire scene were towel-type material, laminate flooring, carpet padding, a tank top shirt, and carpet. 4 VRP 598, 608. A bullet was also found at the scene. 4 VRP 604. This bullet is Exhibit 20. 4 VRP 615. The bullet had dark red markings on it and was disfigured, as if it had hit a hard object. *Id.* That bullet had the same class characteristics as the bullets removed from Brandon Zomalt's body<sup>11</sup> and Defendant's house.<sup>12</sup> Exhibit 21, a spent casing, was also found at the Peasley Canyon fire scene. 4 VRP 618. The spent casing came from a semiautomatic pistol.<sup>13</sup> The tank top shirt had Brandon Zomalt's blood on it. 7 VRP 1056. A lot of bloody material was found at the scene. 4 VRP 607-10.

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<sup>11</sup> Exhibits 95 and 97 were recovered by Dr. Lacy from Brandon Zomalt's body. 6 VRP 890.

<sup>12</sup> Exhibit 72 was a bullet recovered from behind a wall of defendant's house. 5 VRP 831. Exhibit 91 was a bullet recovered from inside the love seat in defendant's house. *Id.*

<sup>13</sup> 7 VRP 1096.

Mr. Zomalt's dead body laid undiscovered for at least several weeks. 6 VRP 897. His body was discovered in Defendant's house on September 1, 2014. 5 VRP 716, 739; 5 VRP 804.

C. ARGUMENT

1. THE CHALLENGED FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

A trial court's findings of fact following a motion to suppress evidence are verities on appeal if unchallenged. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). If findings are challenged, courts review the record for substantial evidence to support the findings. *Hill*, 123 Wn.2d at 644, 870 P.2d 313. Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Hill* at 644, 870 P.2d 313.

A challenge to the sufficiency of the evidence is reviewed in the light most favorable to the state. *State v. Stewart*, 141 Wn. App. 791, 794, P.3d 111 (2007). In reviewing findings of fact entered following a motion to suppress, courts review only those facts to which error was assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts are binding on appeal. *Hill* at 647, 870 P.2d 313. Conclusions of law pertaining to suppression of evidence are

reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

a. Finding Of Fact III is Supported by Substantial Evidence, Except in One Immaterial Particular.

Finding of Fact II states:

On September 1, 2014, two calls came in to law enforcement, both of which were made by a male caller who wanted to remain anonymous. The first came into the Puyallup PD “tip line,” saying there was a “possible dead body” at the listed address. The other came in to South Sound 911, saying the caller’s friends “Mike” said he “shot someone” at the listed address, and “possibly killed him,” and “said it was self-defense.”

CP 354. The court’s findings regarding the order of the anonymous 911 calls are incorrect. South Sound 911 received the first call, while the Puyallup PD tip line received the second call after deputies were dispatched. The remaining findings of fact in Finding of Fact III are supported by substantial evidence.

Sgt. Clarkson testified that the first anonymous call was made to South Sound 911 at 6:38 p.m. 1 VRP 24. The caller reported that his friend “Mike” said he shot someone at a duplex located at Unit B of 13008 Military Rd E. in Puyallup, and “possibly killed him,” and “said it was self-defense.” 1 VRP 24, 61-65. Dep. Olivarez testified that, in response to the call, Pierce County Sheriff’s Deputies were dispatched to the location at 6:39 p.m. to conduct a “welfare check.” 1 VRP 125-126. After

the first two deputies arrived at the duplex, a second anonymous call came into the Puyallup PD “tip line” at 6:56 p.m. reporting a “possible dead body” at the same address. 1 VRP 24, 65-66.

Sgt. Clarkson and Dep. Olivarez testified at trial that South Sound 911 received the first call and Puyallup PD received the second call, and the trial court credited this testimony. CP 359. Defendant does not challenge this finding, making it a verity upon appeal. The deputies’ testimony is sufficient to persuade a fair-minded, rational person that South Sound 911 received the first call and the Puyallup PD tip line received the second call, after deputies were dispatched to the duplex.

b. Finding of Fact IV is Supported by Substantial Evidence.

Finding of Fact IV states:

As a result of those calls, Pierce Co. Sheriff’s Deputies were dispatched to Unit B of a duplex located at 13008 Military Rd. in Puyallup. The first deputies to arrive were Dep. Ryan Olivarez and Dep. Fredrick Wiggins. Dep. Wiggins and Dep. Olivarez each testified they were responding to the Military Rd. address for a “welfare check.” Neither of those deputies had heard the anonymous calls. There is no evidence either of those deputies had seen the bulletin that was sent out by Auburn PD. The deputies attempted to raise someone inside the residence by knocking on the door, but there was no response.

CP 354. The trial court properly found that neither Dep. Wiggins nor Dep. Olivarez heard the anonymous calls made to South Sound 911 and the

Puyallup PD tip line. CP 354. The deputies testified that they were given information by dispatch and did not directly receive or hear the anonymous calls themselves. 1 VRP 127, 2 VRP 233.

Dep. Olivarez testified that dispatch sent him to the duplex to conduct a welfare check. 1 VRP 127. Dispatch received the call reporting that an individual named Mike supposedly shot somebody at the residence, and the location was Mike's residence. 1 VRP 127. Although dispatch relayed the above information to Dep. Olivarez, he did not testify to hearing the call himself. 1 VRP 127. Similarly, Dep. Wiggins testified that dispatch sent him to the duplex to conduct a welfare check. He also testified that he did not actually listen to any of the 911 calls, or any recordings concerning who called in the information. 1 VRP 233. The information he had upon arriving was limited to that given by dispatch, stating that there was potentially a dead body in the house. 1 VRP 233.

Based on the deputies' statements indicating that dispatch relayed information from the anonymous calls, a fair-minded, rational person could find that neither Dep. Wiggins nor Dep. Olivarez heard the calls themselves.

- c. Finding of Fact IX Incorrectly States the Order in Which Sergeants Adamson And Clarkson Arrived on the Scene. Sgt. Clarkson Arrived First. The Remainder of Finding of Fact IX is Supported by Substantial Evidence.

Finding of Fact IX states:

Sgt. Christopher Adamson was the last of the deputies to arrive at the duplex. His intent was to confirm or refute the information provided in the anonymous calls. Sgt. Adamson recalled that the dispatch involved someone may be “dead or dying” at the address. He was briefed by the other at the scene about their observations and actions prior to his arrival. Sgt. Adamson listened to the message that was left on the Puy PD tip line, and he testified that his understanding of this situation from that call was “a dead body might be found” at the location. Sgt. Adamson smelled the foul odor around the complex, which he thought could be a dead body but could also have been from rotting garbage. Sgt. Adamson intended to confirm, before entering the duplex, whether there was a victim of violence inside, either dead or alive.

CP 356. Contrary to the court’s finding, Sgt. Adamson arrived on the scene last. CP 356. Sgt. Clarkson testified that he arrived at the duplex at 7:17 p.m. and that Sgt. Adamson arrived four minutes earlier. 1 VRP 25. Adamson confirmed that Clarkson arrived at some point after he did. 1 VRP 94. The sergeants’ testimony could persuade a fair-minded, rational person that Sgt. Clarkson was last to arrive at the duplex, after Sgt. Adamson. The remainder of Finding of Fact IX is unchallenged by Defendant.

d. Finding of Fact XVI is Supported by Substantial Evidence

Finding of Fact XVI states:

All of the information the deputies gathered prior to their entry into the duplex was done for the purpose of determining the welfare of anyone inside the duplex, without the need for going inside the duplex to make that determination.

CP 358. The trial court found that all of the information the deputies gathered prior to entry was done solely to determine the welfare of anyone inside the duplex, without the need for entering the duplex to make that determination. CP 355. The deputies' testified that they arrived on the property to conduct a welfare check and gathered information to confirm or deny whether someone was in need of assistance at the duplex. 1 VRP 75, 122; 2 VRP 226-28.

Sgt. Clarkson testified that, during suspicious welfare checks, deputies typically go around and get information to determine if they need to force entry and provide aid. 1 VRP 75. Similarly, Sgt. Adamson testified that he wanted to determine whether he could find any evidence to support the 911 tips, which were anonymous and lacked any substantiating information. 1 VRP 88-89. He gathered information to locate the occupant of the duplex and validate the information given in the anonymous tips: that someone was dead or dying in the house. VRP 122.

Dep. Wiggins testified that he spoke with neighbors to get background information and determine if anyone was seen at the duplex. 2 VRP 228. He looked around the property to conduct a routine welfare check to see if there is anything out of the ordinary or suspicious at the duplex. 2 VRP 226-227.

The deputies' testimony provides sufficient evidence that the deputies' intended to determine the welfare of anyone inside the duplex, without entering the duplex, by gathering more information about the home and its residents.

e. Finding of Fact XIX is Supported by Substantial Evidence

Finding of Fact XIX states:

The final decision to enter the duplex was made by Sgt. Adamson and Sgt. Clarkson. All four of the deputies believed, both subjectively and collectively, that there might be a dead body inside the duplex, and that the death might have been a homicide, but all four deputies intended, both subjectively and collectively, to enter the duplex solely to determine the welfare of "Mike" (the Defendant) and the welfare of Brandon Zomalt. None of the deputies intended to advance a criminal case investigation that had been started by Auburn PD. None of the deputies intended to conduct a criminal investigation inside the duplex. Prior to entering the duplex, none of the deputies could articulate a specific crime that was suspected of being committed, or a person thought to have committed a crime, at the duplex.

CP 359. The trial court determined that the deputies entered the duplex to determine the welfare of the occupants, not to conduct a criminal

investigation. CP 356. The limited scope of the deputies' purpose in entering the duplex is evidenced by both their testimony at trial and their actions inside the duplex.

All four of the deputies believed that a possible dead or dying person was inside the duplex, but could not confirm this with certainty without entering the duplex. 1 VRP 45, 96-98. Sgt. Clarkson and Dep. Olivarez testified that they entered the duplex solely to determine the welfare of the residents. 1 VRP 81, 138. Dep. Olivarez also testified that they did not enter the duplex in connection to criminal knowledge and did not conduct a criminal investigation. Rather, they were trying to determine if someone in the duplex needed help. 1 VRP 139.

Once inside the duplex, the officers did not collect or search for evidence in connection to any crime, but only searched areas where a dead or dying person may be found. Sgt. Adamson testified that neither he nor any other sheriff's deputy searched any area too small for a body or collecting anything, prior to finding the body. 1 VRP 100. Sgt. Clarkson confirmed this. VRP 51. They were there to determine whether there was a victim in the house, either dead or alive. VRP 101. Dep. Olivarez also testified that, when searching the duplex, he did not collect anything because he only intended to confirm whether anybody inside the duplex needed help. 1 VRP 141-142.

None of the deputies intended to advance the criminal case investigation started by Auburn PD. During Sgt. Clarkson's brief call with Auburn Detective Faini, he did not receive a description of the carpet. Det. Faini showed interest in or obtain details of Detective Faini's investigation beyond its possible relation to a missing person and potential homicide case. 1 VRP 38. The only name Sgt. Clarkson testified to receiving from Det. Faini was that of Brandon Zomalt, not "Mike." 1 VRP 36-37. Sgt. Clarkson testified that, after the call, he "didn't have any clue what we were looking into," and did not know whether "Mike" was related to the Auburn investigation. 1 VRP 38-39. Neither Sgt. Adamson nor Sgt. Clarkson believed they had probable cause for a warrant based on that call. 1 VRP 39-40.

The trial court also correctly found that none of the deputies intended to conduct a criminal investigation inside the duplex because they did not have either a suspect or a crime in mind. Sgt. Clarkson testified that he did not have any definitive information as to a particular crime that was committed at that scene or a suspect for a crime at that scene. 1 VRP 45. He believed he was dealing with a suspicious welfare check and possibly someone down inside. 1 VRP 45. He also testified that it is common to be dispatched to potential dead bodies where, after entry, he confirmed no crime occurred. 1 VRP 79. Sgt. Adamson also

testified that he did not have a victim or a suspect at the scene, and was not sure he had a crime either. While he had suspicions, he did not have enough information to decide a crime happened. 1 VRP 95. He felt that, based on his obligation to ensure public safety, their only option was to force entry to determine someone was not dying in the duplex. 1 VRP 96-97.

One brief call with little detail between Detective Faini and Sgt. Clarkson does not impute the knowledge of the Auburn investigators onto the Pierce County deputies. Based on the deputies' testimony, which the trial court found credible and Defendant did not challenge, their purpose in entering the duplex was not to conduct a criminal investigation, but to determine whether someone inside the house needed help.

f. Finding of Fact XX is Supported by Substantial Evidence

Finding of Fact XX states:

None of the four deputies who responded to the duplex thought there was probable cause to obtain a search warrant because they did not have sufficient evidence to conclude that any crime had occurred inside, and they did not have sufficient evidence to identify any person as a suspect thought to have committed any crime.

CP 359. None of the four deputies who responded to the duplex believed they had probable cause to obtain a search warrant. Sgt. Clarkson testified that he did not have enough information to obtain a search warrant

because he had no idea what crime, if any, he was dealing with and did not have a suspect at that point. 1 VRP 32, 39-46. Sgt. Adamson testified that, based on his training and experience, they did not have probable cause to get a search warrant for the duplex because they did not have a victim, a suspect, or a specific crime in mind. 1 VRP 95. Dep. Olivarez testified that, before entering the duplex, he did not know whether or not what happened at the duplex was going to end up being a crime. 1 VRP 140.

g. Finding of Fact XXIV is Supported by Substantial Evidence.

Finding of Fact XXIV states:

Based on the way the body was rolled up inside the carpet, the deputies concluded the person inside was not likely a suicide, but a homicide. That was the first definitive evidence that a homicide had been committed, so the deputies secured the scene and obtained a search warrant before proceeding any further.

CP 360. The deputies did not have definitive evidence of any crime that occurred in the duplex until they saw the dead body in the garage. 1 VRP 45. Based on the way the body was rolled up inside the carpet, the deputies concluded the person inside died of a homicide, not a suicide. VRP 57, 105. Sgt. Adamson testified that, upon seeing the deceased and decaying body rolled up in a carpet, he determined the death was due to a crime, not a natural death. 1 VRP 105. He did not have

probable cause for any particular crime until he saw the dead body in the garage. 1 VRP 105. Sgt. Clarkson also testified that, upon seeing the body in the carpet, he determined they were dealing with a crime scene. He sealed off the area until he obtained a warrant. 1 VRP 57.

2. THE WARRANTLESS ENTRY INTO THE  
DUPLEX WAS LAWFUL UNDER THE  
COMMUNITY CARETAKING EXCEPTION TO  
THE WARRANT REQUIREMENT

The warrantless entry into the duplex was justified under both the routine health and safety check and the emergency aid aspects of the community caretaking exception. The deputies acted in their community caretaking function because they (1) entered to determine the welfare of anyone inside the home, (2) responded to reports of a possible dead body at the duplex, and (3) searched the premises with no intent to conduct a criminal investigation. The court properly denied Defendant's motion to suppress under both the Fourth Amendment and Article 1, § 7 of the Washington Constitution.

- a. The Warrantless Entry in This Case is Properly Analyzed Pursuant to Established Washington Law, Not the Modified Exigent Circumstances Exception Proposed by Defendant.

Defendant confuses the exigent circumstances exception, the emergency exception, and the community caretaking exception and

proposes a hybrid analysis based on these three concepts. One exception to the warrant requirement is the sometimes overlapping emergency and community caretaking exceptions.<sup>14</sup> While the two terms are used interchangeably, the emergency exception is a subset of the community caretaking exception to the warrant requirement. *State v. Smith*, 177 Wn.2d 533, 541, 303 P.3d 1047 (2013). The emergency exception recognizes the community caretaking function of police officers, and exists so officers can assist citizens and protect property. *State v. Johnson*, 104 Wn. App. 409, 16 P.3d 680 (2001). The community caretaking exception allows police officers to invade constitutionally protected privacy rights when necessary to render emergency aid or assistance or to make routine checks on health and safety. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004).

The emergency aid aspect of the community caretaking doctrine is remarkably similar to the exigent circumstances exception to the Fourth Amendment's warrant requirement. Courts often use the terms interchangeably. Mary Elisabeth Naumann, *The Community Caretaker*

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<sup>14</sup> “In *State v. Kinzy*, 141 Wn.2d 373, 387, 5 P.3d 668 (2000), the Washington Supreme Court clarified the distinctions between these sometimes mislabeled or overlapping exceptions. The community caretaking exception originated in the context of automobile searches and seizures. *Id.* at 386, 5 P.3d 668. Washington case law then expanded the community caretaking exception to encompass situations involving emergency aid or routine checks on public health and safety, which possess their own separate tests.” *State v. Williams*, 148 Wn. App. 678, 201 P.3d 371 (2009) (HUNT, J. dissenting).

*Doctrine: Yet Another Fourth Amendment Exception*, 26 Am. J. Crim. L. 325, 333 (1999). Although both exceptions involve situations in which officers must act immediately, they have distinctly different purposes. *Id.*

Unlike exigent circumstances, the emergency aid exception does not involve officers investigating a crime; rather, the officers are assisting citizens or protecting property as part of their general caretaking responsibilities to the public. *State v. Swenson*, 59 Wn. App. 586, 589, 799 P.2d 1188 (1990). On the other hand,

When the police act pursuant to the exigent circumstances exception, they are searching for evidence or perpetrators of a crime. Accordingly, in addition to showing the existence of an emergency leaving no time for a warrant, they must also possess probable cause that the premises to be searched contains such evidence or suspects. In contrast, the community caretaker exception is only invoked when the police are not engaged in crime-solving activities.

(citations omitted) *People v. Ray*, 21 Cal. 4th 464, 471, 981 P.2d 928, 933, 88 Cal. Rptr. 2d 1, 6–7 (1999). The reasoning behind the community caretaking doctrine precludes equating the emergency aid doctrine to exigent circumstances because the latter involves criminal investigation, while the emergency aid doctrine solely concerns issues aside from the detection or investigation of crime. *Naumann* at 333.

Defendant proposes a limited version of the community caretaking exception that confines community caretaking to automobiles, unless some exigency or emergency justifies the officers' belief that there is need

for immediate action. Appellant's Brief at 47. However, this approach improperly conflates the community caretaking's emergency aid aspect and exigent circumstances as one in the same, where the two are distinct exceptions to the Fourth Amendment's warrant requirement.

The present case should be evaluated under the community caretaking standard, not the modified exigent circumstances standard proposed by Defendant. Defendant suggests the court override the well-established community caretaking exception in favor of a hybrid analysis based on the rulings of various federal courts. Appellant's Brief at 47. However, the cases cited by Defendant fail to address that the community caretaking exception encompasses the emergency aid exception, which applies in situations separate from the investigation of crime. *Naumann* at 333. Here, the deputies acted as community caretakers, not criminal investigators, in responding to a situation where they believed someone was in need of health or safety assistance. The "exigent circumstances" exception does not apply to this case because the officers, with factual support, did not believe they possessed sufficient facts to acquire a criminal search warrant. CP 48 (Finding of Fact XX). Thus, applying the modified exigent circumstances standard prescribed by Defendant is inappropriate.

- b. The Warrantless Entry in This Case was Justified Under Both the Routine Health and Safety Check and Emergency Aid Aspects of the Community Caretaking Exception to Article 1, § 7.

This case is not about Fourth Amendment protections, but about Article I, Section 7 protections. Article I, Section 7 is more protective of individual privacy rights than the Fourth Amendment, particularly where warrantless searches are concerned.” *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000); *State v. Smith*, 177 Wn.2d 533, 539, 303 P.3d 533 (2013).

The community caretaking exception to the warrant requirement is recognized under both Article 1, § 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution. *State v. Schultz*, 170 Wn.2d 746, 754, 248 P.3d 484 (2011); *Cady v. Dombrowski*, 413 U.S. 433, 447–448, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). It allows police officers to invade constitutionally protected privacy rights when necessary to render aid or assistance or to make routine checks on health and safety. *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). The Washington Supreme Court has recognized three subsets of the community caretaking exception to the Article I, Section 7 warrant requirement: (a) “routine checks on health and safety;” (b) “emergency aid;” and (c) “save life.” *State v. Smith*, 177 Wn.2d 533, 541, 303 P.3d

533 (2013). “Routine checks on health and safety” and “emergency aid” are the sub-exceptions applicable to this case.<sup>15</sup>

Both routine health and safety checks and emergency aid apply when: (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance and (3) there was a reasonable basis to associate the need for assistance with the place searched. *Kinzy*, 141 Wn.2d at 676; *Thompson*, 151 Wn.2d at 802.

Both situations may require police officers to render aid or assistance. *Id.* However, the two exceptions diverge on the second prong, based on the type of health or safety assistance contemplated. While routine health and safety checks require a reasonable concern for the occupant’s well-being, emergency aid situations require: (4) an imminent threat of substantial injury to a persons or property; (5) the state agents believe a specific person or persons or property are in need of immediate help for health and safety reasons; and (6) the claimed emergency is not a mere pretext for an evidentiary search. *State v. Schultz*, 170 Wn.2d at 754.

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<sup>15</sup> The “save life” sub-exception of the community caretaking exception is not outcome-determinative because this exception requires circumstances necessitating immediate action to protect life or property. *State v. Smith*, 177 Wn.2d at 541 (save life exception).

Compared with routine checks on health and safety, the emergency aid function involves circumstances of greater urgency and searches resulting in greater intrusion. *State v. Acrey*, 148 Wn.2d 738, 750, 64 P.3d 594 (2003) (quoting *Kinzy*, 141 Wn.2d at 386–87). As noted in *Cady*, a search pursuant to the community caretaking function exception must be totally divorced from a criminal investigation. *Kinzy*, 141 Wn.2d at 386.

While the Supreme Court has held that the Fourth Amendment’s community caretaking exception does not include a subjective requirement, the more protective Washington Constitution retains a subjective officer motivation component. In 2006, the United States Supreme Court held that “[a]n action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify the action.” (braces and internal quotation omitted) *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948, 164 L. Ed. 2d 650 (2006). Up until *Brigham City*, the scope of the Article 1, § 7 community caretaking analysis tracked with Fourth Amendment community caretaking analysis—each included a subjective officer motivation component. *State v. Acrey*, 148 Wn.2d 738, 748, 64 P.3d 594 (2003).

After *Brigham City*, this court continued to apply the subjective motivation component in Article 1, § 7 community caretaking cases.

*Smith*, 177 Wn.2d at 541; *State v. Hos*, 154 Wn. App. 238, 246-247, 225 P.3d 389 (2010). The Court held that the community caretaking function applies when:

(1) the officer subjectively believed that someone likely needed assistance for health and safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.

(emphasis added) *Hos*, 154 Wn. App. at 246-47. This test restates, under Article 1, § 7, Washington’s settled pre-*Brigham City* Fourth Amendment community caretaking test:

(1) The police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched.

*State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). In *State v. Smith*, 177 Wn.2d at 541-42, the Supreme Court included the subjective officer motivation standard when it decided Article 1, § 7’s community caretaking “save life” exception. The adoption of the subjective standard for one community caretaking exception necessarily implies the adoption of that exception for the other two recognized exceptions. The test

expressed in *Hos* and *Thompson* represents Article 1, § 7's community caretaking exception analysis.<sup>16</sup>

c. The Deputies Subjectively Believed  
Brandon Zomalt and "Mike" Were in Need  
of Health and Safety Assistance.

Officers act within their community caretaking function where they subjectively believe that someone inside the home or residence might be injured or be in danger. *State v. Lawson*, 135 Wn. App. 430, 432-434, 144 P.3d 377 (2006) (refusing to apply the community caretaking exception where officer did not ask about Defendant's health or well-being or have any information that anyone on Defendant's property was injured or in need of immediate help); *State v. Johnson*, 104 Wn. App. 409, 413, 16 P.3d 680 (2001) (applying the community caretaking exception where officer responded to a domestic violence report, did not know how many victims were involved in the incident, and entered the home to determine whether another victim might be in danger and needed assistance).

The deputies acted within their community caretaking function because they subjectively believed that either or both "Mike" and Brandon

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<sup>16</sup> The State does not present an argument that the law should be otherwise in this brief, because such an argument ought to be reserved for the Supreme Court. At any event, for all practical purposes, the subjective motivation element in this case was fairly resolved by the trial court in Findings of Fact XVI and XIX. CP 358-59.

Zomalt were potentially injured and in need of assistance. This subjective belief is supported both by unchallenged Finding of Fact XVIII and Finding of Fact XIX. As these findings are supported by substantial evidence, the first prong of the community caretaking exception is established.

- d. A Reasonable Person in the Deputies' Situation Would Reasonably Believe There Was a Need For Health or Safety Assistance.
  - i. **The deputies acted within the routine health and safety check exception because they had a reasonable concern for the well-being on Brandon Zomalt and "Mike."**

Rendering aid or assistance through a health and safety check is considered a hallmark of the community caretaking function exception, otherwise a police "officer could be considered derelict by not acting promptly to ascertain if someone needed help." *Kinzy*, 141 Wn.2d at 385-386, 389. Police may be required to perform a warrantless search, not in response to an immediate emergency, but as part of their function of protecting an assisting the public. *State v. Gocken*, 71 Wn. App. 267, 275, 857 P.2d 1074 (1993).

An officer acts within the routine health and safety check exception applies where surrounding circumstances generate a reasonable

concern for the well-being of the home's occupants. *State v. Menz*, 75 Wn. App. 351, 352-355, 880 P.2d 48 (1994) (applying community caretaking exception where abnormal circumstances at residence corroborated anonymous report of domestic violence); *State v. Hos*, 154 Wn. App. 238, 246-248, 225 P.3d 389 (2010) (applying the community caretaking exception where the officer repeatedly knocked and pounded on the door with no response and Defendant appeared either unconscious or dead inside house); *State v. Williams*, 148 Wn. App. 678, 686, 201 P.3d 371 (2009) (refusing to apply the community caretaking exception where officers had no information or concern that somebody inside the motel room was injured or in danger); *State v. Gocken*, 71 Wn. App. 267, 857 P.2d 1074 (1993) (applying the community caretaking exception where officer responded to missing person report of person who had known physical and mental problems).<sup>17</sup>

In the present case, the deputies had a reasonable concern for both Mike and Zomalt's well-being based on the anonymous calls and corroborating information gathered. This case is similar to *Gocken*, where the officer responded to a missing person report, observed missing furniture through the window, and received no response when he knocked

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<sup>17</sup> In *United States v. Gwinn*, 219 F.3d 326 (4th Cir. 2000), the Fourth Circuit upheld a community caretaking-based warrantless entry into a trailer where the arresting officer entered an arrestee's trailer to obtain clothing for his partially clothed arrestee to wear.

on the door. *Gocken*, 71 Wn. App. at 270-271. The Court found the officer's entry into the home lawful because a reasonable person would have concluded that the occupant might have been injured and unable to care for herself or call for help – necessitating a routine check on her welfare. *Id.* at 277.

Here, the deputies responded to reports of a shooting and a “possible dead body” at the duplex, smelled an overwhelming foul odor consistent with decaying flesh or garbage, and learned that neither of the men had been seen or heard from in days. CP 43-47 (Findings of Fact III, V, IX, XVII). Moreover, the house was unusually void of foot traffic in or out of the duplex, nobody took the dog outside in several days, and the deputies observed ripped up carpet and overturned furniture, indicating a struggle in the home. CP 46-47 (Finding of Fact XII, XVII). None of this information confirmed that “Mike” or Zomalt were safe or alive. In fact, this information raised the deputies' suspicions that the men may be either dead or dying and in need of assistance. CP 47 (Finding of Fact XVII). The deputies had a reasonable concern that either Mike or Zomalt was injured or in danger. Thus, the deputies lawfully entered the duplex to conduct a routine health and safety check of the men's welfare.

ii. **Alternatively, the deputies acted within the emergency aid exception because they had a reasonable belief that there was someone dead or dying inside the duplex.**

A police officer's warrantless entry into a residence in response to a 911 call, or a report of someone needing assistance, may also be justified under the emergency aid exception. *State v. Schroeder*, 109 Wn. App. 30, 39, 32 P.3d 1022, 1026 (2001), as modified (Nov. 21, 2001); E.g., *Johnson*, 104 Wn. App. at 412, 16 P.3d 680 (domestic violence report), *State v. Gibson*, 104 Wn. App. 792, 795, 17 P.3d 635 (2001) (report of babysitter smoking marijuana); *Menz*, 75 Wn. App. at 352, 880 P.2d 48 (domestic violence report); *State v. Leupp*, 96 Wn. App. 324, 326, 980 P.2d 765 (1999) (911 hang up call), *review denied*, 139 Wn.2d 1018, 994 P.2d 849 (2000); *State v. Angelos*, 86 Wn. App. 253, 254, 936 P.2d 52 (1997) (Defendant's 911 call that she had overdosed on drugs), *review denied*, 133 Wn.2d 1034, 950 P.2d 478 (1998); *State v. Gocken*, 71 Wn. App. 267, 269, 857 P.2d 1074 (1993) (call from a concerned friend), *review denied*, 123 Wn.2d 1024, 875 P.2d 635 (1994); *State v. Lynd*, 54 Wn. App. 18, 19, 771 P.2d 770 (1989) (911 hang up call). The deputies here responded to two 911 calls that reported a shooting and a "possible dead body" at the duplex. CP 43 (Finding of Fact III). Based on the call alone, the deputies were justified in entering the duplex.

Defendant argues that the officer's delay in acting indicates that there was no need for immediate action, as required for emergency aid cases. Appellant's Brief at 45-48. However, "the fact that an officer lets some time pass before entering the residence does not automatically negate the application of the emergency exception." *Commonwealth v. Townsend*, 453 Mass. 413, 427, 902 N.E.2d 388 (2009). This is true where the officer makes a reasonable attempt to gain immediate entry. *Id.* In the case cited Defendant, the Court found no need for immediate action where MPD was on the scene for five hours, fully secured the area prior to entry, and had Defendant in custody after surrendering peacefully. *Corrigan v. District of Columbia*, 841 F.3d 1022, 1034 (D.C. Cir. 2016).

Unlike *Corrigan*, the deputies only waited 1.5 hours before forcing entry, did not conduct a previous sweep and secure the area, and did not have Defendant in custody. CP 47 (Finding of Fact XV). Because they did not observe someone dead or in need of medical assistance in the house, the deputies attempted to gather more information and confirm whether the anonymous reports were true. CP 47 (Finding of Fact XVI). During the 1.5 hour delay in entering the duplex, the deputies attempted to gather information to confirm or deny the 911 call. CP 47 (Finding of Fact XVI).

The deputies could not confirm the safety of either Mike or Brandon Zomalt and the information that they gathered only increased their concern for the men's welfare. CP 47 (Finding of Fact XVII). They also attempted to gain consent to enter the duplex by contacting the property owner, Keith Tofstad. They attempted to contact Defendant, who they learned was a sex offender living at that address, but the call went to voicemail. CP 44-46 (Findings of Fact V, X, XI). After exhausting reasonable means to gain entry, the deputies felt their only option was to force entry to make sure someone wasn't dead or dying in the duplex. VRP 96.

Courts have also found a warrantless entry justified where officers respond to reports of a dead body. The Ninth Circuit has explicitly held that reports of possibly injured victims or dead bodies constitute an emergency, as "report of a dead body can easily lead officers to believe that someone might be in need of immediate aid." *U.S. v. Stafford*, 416 F.3d 1068, 1074, 05 Cal. Daily Op. Serv. 6831 (2005) (finding that officers had a reasonable belief an emergency existed and assistance was necessary based on report of a possible dead body in an apartment unit covered in blood and feces with needles littering the floor).

The Eleventh and Seventh circuits have also held that reports of a dead body are emergencies justifying warrantless searches and entries.

*United States v. Holloway*, 290 F.3d 1331, 1336 (11th Cir.2002) (noting that warrantless searches and entries are reasonable when officers “reasonably believe that a person within is in need of immediate aid”); *United States v. Richardson*, 208 F.3d 626, 627-31 (7th Cir.2000) (finding that a report of a raped and murdered woman constituted an emergency situation because the person could still be alive and in need of assistance); *United States v. Salava*, 978 F.2d 320, 324-25 (7th Cir.1992) (finding that a report of a dead body justified a warrantless search of a residence); *United States v. Hogue*, 283 F.Supp. 846, 848-49 (N.D.Ga.

1968) (finding emergency situation based on specific report of a recently wounded victim and report of a possible dead body).<sup>18</sup>

Here, the deputies had a reasonable belief that either Mike or Zomalt were injured or dead in the duplex based on the reports that “Mike” shot someone and there was a “possible dead body.” VRP 24, 61-65. Based on the information gathered during their initial response, the deputies could not confirm whether an immediate emergency existed. CP 47 (Finding of Fact XV). However, federal courts have held that a report

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<sup>18</sup> In *Johnson v. State*, 386 So.2d 302 (Fla.App.1980) the facts were briefly set out by the Florida Court of Appeals:

The Daytona Beach Police Department received an anonymous telephone call that a dead body was located in the bedroom closet of a specified apartment and that entrance would have to be through the bedroom window. An investigating officer, who immediately went to the apartment, knocked on the door and received no response. At the officer's request, the manager of the apartment house opened the door. The officer, upon opening the door, could detect the odor of decomposition. The body of Thomasena Johnson, appellant's pregnant wife, was found in the bedroom closet. Several items found in the apartment were seized at the time the body was discovered.

*Johnson*, 386 So.2d at 303. The body and the items found in the house were not suppressed. *Id.* This Court can also note the circumstances presented to the Seventh Circuit in *United States v. Richardson* where a 911 caller, who provided a name, reported

that a 19-year-old African-American man named “Lucky” had raped and murdered a female. The caller said that the victim could be found in the basement at 1704 N. 37th Street, a residence the caller described as “a drug house.” The caller identified himself to the 911 operator as “Anthony Carter” and explained that he lived at the same address. The police had received a 911 call reporting a murder at the same address one week before Anthony Carter's call. That call turned out to be a false alarm: there was no murder victim.

*United States v. Richardson*, 208 F.3d 626, 627-28 (7th Cir. 2000). Based on that information, relating to a person already dead, the Court found an exigent circumstances emergency and upheld a warrantless entry into the residence. 208 F.3d at 629-31.

of a dead body or possibly injured victim, alone, is enough to establish an emergency justifying a warrantless entry because it “can easily lead officers to believe that someone might be in need of immediate aid.” *Stafford*, 416 F.3d at 1074; *see also Rasucher v. State*, 129 S.W.3d 714, 723 (2004) (finding that officers may enter apartment where report of a homicide or body could lead a reasonable officer to believe the person was still alive and in need of immediate emergency aid). This reasoning is reiterated by Sgt. Clarkson’s testimony that he has been “dispatched to a possible dead body and found live people.” 1 VRP 78.

As the deputies gathered more information about the men and activity at the duplex, they could not locate or confirm the safety of Mike or Zomalt. CP 47 (Finding of Fact XVII). While they suspected a dead body was inside duplex, they could not confirm this with certainty without entering, and believed that someone could still be alive and injured in the duplex. *Id.* Based on the report that “Mike” shot someone in self-defense, there was a “possible dead body” at the duplex, and the suspicious surrounding circumstances, the deputies’ reasonably believed that Zomalt or “Mike” were either dead or dying in the house – which is sufficient to establish an emergency.

e. A Reasonable Basis Existed for Associating the Need for Assistance with the Place Searched.

Last, the deputies had a reasonable basis for associating the need for assistance with the duplex because the 911 caller identified that address and indicated that “Mike” shot someone and “Mike” lived at the duplex. CP 354 (Finding of Fact III). The deputies also learned that Brandon Zomalt’s last known address was the duplex. RP 67. Based on the 911 call and the subsequent information gathered, the officers had a reasonable basis for associating the need for assistance with the duplex.

f. The Warrantless Entry was Lawful Because the Search of the Duplex was Totally Divorced From a Criminal Investigation.

A search pursuant to the community caretaking function must be totally divorced from a criminal investigation. *Cady*, 413 U.S. at 441, *Kinzy*, 141 Wn.2d at 385, *Thompson* at 802. The community caretaking exception does not apply where an officer’s primary motivation is to search for evidence or make an arrest. *State v. Williams*, 148 Wn. App. 678, 683, 201 P.3d 371 (2009). “Whether an encounter made for noncriminal, noninvestigatory purposes is reasonable depends on a balancing of the individual’s interest in freedom from police interference against the public’s interest in having the police perform a ‘community caretaking function.’” *Kinzy*, 141 Wn.2d at 387. When a person has not

been seized, balancing the interests usually favors the action by police.

*Kinzy*, 141 Wn.2d at 394.

This Court has found the community caretaking function properly divorced from a criminal investigation where an officer's primary motivation is to determine the occupant's welfare, rather than to search for evidence of a crime. *State v. Schlieker*, 115 Wn. App. 264, 267-268, 62 P.3d 520 (2003) (finding the warrantless entry unlawful where the deputies were not concerned about defendants' safety, entered to investigate trespassing and drug activity, handcuffed and arrested Defendants, and reentered to search for evidence of criminal activity); *State v. Link*, 136 Wn. App. 685, 696, 150 P.3d 610 (2007) (finding the warrantless entry unlawful where the officer was concerned about the children's safety after smelling acetone, but his primary motivation in entering the home was to investigate a possible meth lab); *State v. Weller*, 185 Wn. App. 913, 344 P.3d 695 (2015) (finding a warrantless entry lawful where officers' entered garage in order to find private place to interview children for welfare check and did not search for evidence).

The deputies' search was divorced from any criminal investigation because their primary motivation was their concern for the welfare of Mike and Zomalt, not to search for evidence of a crime. This is supported

by Findings of Fact XVI and XIX, both of which are supported by substantial evidence.

When weighing Defendant's privacy interest against the public's interest in having police perform their community caretaking function, the balance tips in favor of the community caretaking function. As no seizure occurred, the balance favors the action of police. *See Kinzy*, 141 Wn.2d at 387. While Defendant has a substantial interest in freedom from police interference, this interest is far outweighed by the public's interest in having police determine the welfare of residents believed to be in danger and in the policing of dead bodies. If the deputies left the scene without entering the residence, they would have been derelict in their duties to the public.

Moreover, refusing to apply the community caretaking exception to situations where police officers reasonably believe someone is in danger could result in officers less willing to carry out their community caretaking functions. This

implicates seriously undesirable consequences for society at large: In that event, we might reasonably anticipate "the assistance role of law enforcement ... in this society will go downhill.... The police cannot obtain a warrant for ... entry. [W]ithout a warrant, the police are powerless. In the future police will tell such concerned citizens, 'Sorry. We can't help you. We need a warrant and can't get one.' Or, as the Court of Appeal expressed it, "to the extent the [trial] court's

sanction discourages similar conduct, it serves only to hamper lawful and proper police conduct.”

(internal quotation and citation omitted) *People v. Ray*, 21 Cal. 4th 464, 480, 981 P.2d 928, 939, 88 Cal. Rptr. 2d 1, 13 (1999). As Sgt. Clarkson himself testified, “you can’t just walk away from something like that; if we did, there would be a lot of rotting dead bodies in Pierce County.” 1 VRP 46.

3. THE JURY WAS PROPERLY INSTRUCTED ON SELF DEFENSE.<sup>19</sup>

- a. The Trial Court Properly Refused to Instruct the Jury on Self Defense Committed in the Actual Resistance of an Attempt to Commit a Felony.

Within his proposed self-defense instructions (Defendant’s Proposed Instructions 10-27, CP 73-90) Defendant sought to present an alternative basis for self-defense based on the justified use of homicidal force in resistance of an attempt to commit a felony. Defendant’s Proposed Instructions 10-11 and 16-29, CP 73-74 and 79-90. In aid of this defense, Defendant asked the court to instruct the jury on the felonies of kidnapping, unlawful imprisonment, harassment, burglary, and residential burglary. Defendant’s Proposed Instruction 26, CP 89. The court

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<sup>19</sup> The argument in this section presents all the evidence pertaining to self-defense in the light most favorable to defendant. Any evidence that raises doubt on defendant’s testimony is not presented in this section.

properly refused this instruction because kidnapping, unlawful imprisonment, and harassment were already completed offenses when Defendant shot Brandon Zomalt dead, and homicidal violence is not authorized to prevent burglary in Washington.

Defendant was no longer defending himself against kidnapping or unlawful imprisonment when he shot Brandon Zomalt. At the moment Defendant grabbed Brandon Zomalt's pistol, Defendant was no longer a prisoner. The pistol gave him a choice—a choice he actually made: He could leave the apartment or he could go upstairs. 9 VRP 1444-45. He chose to go upstairs. *Id.* The gun, the choice it provided, and Defendant's exercise of that choice freed him from his imprisonment or kidnapping—all before he shot Brandon Zomalt dead.

“The gravamen of harassment is the thrusting of an unwanted communication upon one who is unable to ignore it.” *State v. Alexander*, 76 Wn. App. 830, 837-38, 888 P.2d 179 (1995). In this case the threats were uttered before Defendant fled upstairs from Mr. Zomalt. 9 VRP 1391-93. Later, Defendant went downstairs, got Brandon Zomalt's unattended pistol, then subsequently killed him. 9 VRP 1393-95. The record indicates no threatening conversation when Defendant went back downstairs. *Id.* Brandon Zomalt's harassment of Defendant was a completed offense well before Defendant killed him.

In Washington, a person cannot kill to prevent a burglary. “The justifiable homicide defense applies only if the felony which was sought to be prevented threatens life or great bodily harm.” (emphasis added) *State v. Brenner*, 53 Wn. App. 367, 376, 768 P.2d 509 (1989), *reversed on other grounds by State v. Wentz*, 149 Wn.2d 342, 68 P.3d 282 (2003) (citing *State v. Nyland*, 47 Wn.2d 240, 243, 287 P.2d 345 (1955) and *State v. Griffith*, 91 Wn.2d 572, 576, 589 P.2d 799 (1979)). The same reasoning applies to burglary in the first degree, Defendant’s Proposed Instruction 16. CP 79. Defendant’s instruction would authorize homicidal violence directed at a burglar who carries but does not display a deadly weapon, or who merely spits upon another person. Those offenses do not threaten life or great bodily harm. CP 79.

The trial court properly refused Defendant’s defense of attempt to commit a felony defense because the felonies Defendant was supposedly defending against were either already completed at the time Defendant killed Brandon Zomalt or were not violent felonies which threatened life or great bodily harm.

b. Defendant Was Able to Argue his Theory of the Case.

As Defendant was shooting Mr. Zomalt, he thought: “Don't let him get to me and take the gun away from me and kill me.” 9 VRP 1403-04. He was scared to death and he was “just shooting to stop the threat.” 9 VRP 1468.

The jury was instructed that homicide was justifiable if Defendant reasonably believed that Brandon Zomalt intended to inflict death or great personal injury, that Defendant reasonably believed that there was imminent danger of such harm being accomplished, and that Defendant employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to Defendant, taking into consideration all the facts and circumstances as they appeared to him at the time of and prior to the incident. Instruction 22, CP 119. No error is assigned to the instructions given. Appellant's Brief at 1. Such instruction is appropriate. *State v. Benn*, 120 Wn.2d 631, 658, 845 P.2d 289, *cert. denied*, 114 S. Ct. 382, 126 L. Ed. 2d 331, 62 (1993).

The self defense jury instruction covered what Defendant was actually doing and thinking when he killed Brandon Zomalt. 9 VRP 1403-04, 1468. The situation presented is analogous to *State v. Brenner*, where

a Defendant asserting self defense based upon reasonable fear of death or great personal injury also sought a justifiable homicide instruction based upon defense of an attempt to commit a felony. *Brenner*, 53 Wn. App.

375. The Court held:

The justifiable homicide defense applies only if the felony which was sought to be prevented threatens life or great bodily harm. Instruction 21 allows self-defense in almost the same language: when the slayer believes the decedent intends to inflict death or great personal injury. Therefore, we find that the instruction given allows Brenner to argue his theory of the case.

*Brenner*, 53 Wn. App. at 376. *Brenner* held:

Although a party is entitled to instructions when there is substantial evidence to support them, he or she is not entitled to repetitious instructions. Because justifiable homicide is limited to felonies where the attack on the Defendant's person threatens life or great bodily harm, Brenner's proposed jury instruction simply repeats the substance of instruction 21.

(citations omitted) *Brenner*, 53 Wn. App. at 377. The Supreme Court “has consistently held that a killing in self-defense is not justified unless the attack on the Defendant's person threatens life or great bodily harm.”

*State v. Nyland*, 47 Wn.2d 240, 243, 287 P.2d 345 (1955).<sup>20</sup>

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<sup>20</sup> A justifiable homicide instruction based upon RCW 9A.16.050(2) “depends upon a showing that the use of deadly force was necessary under the circumstances. . . . [A]n individualized determination of necessity is required, contradicting the notion that deadly force is per se reasonable whenever a robbery or other violent felony is attempted.” *State v. Brightman*, 155 Wn.2d 506, 523, 122 P.3d 150 (2005). Defendant’s proposed justifiable homicide instructions do not address necessity.

The self-defense jury instructions tracked with Defendant's testimony. Defendant's proposed justifiable homicide jury instructions were redundant. Thus, he was adequately able to argue his theory of the case.

c. Alternatively, Defendant's Proposed Defense of Felony Instructions Were Properly Rejected as Untimely.

In its "order denying self-defense instructions based on untimely new theory entered on June 15, 2016," the trial court entered exhaustive findings of fact under the captions "procedural history" and "findings of fact." CP 320-26. Defendant assigns no error to any of these findings of fact. Appellant's Brief at 1. They are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). These findings include the following: "[T]he State would have conducted the trial differently if it had been given notice of this theory of self-defense prior to the presentation of the State's case, including the State's case-in-chief, the State's cross-examination of the Defendant, and the State's potential rebuttal evidence." CP 223. The defense of felony instructions were untimely and prejudicial. The trial court properly refused them. CrR 6.15(a).

4. THE PROSECUTOR'S REBUTTAL ARGUMENT WAS FAIR.

A “prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *State v. Russell*, 125 Wn.2d 87, 882 P.2d 747 (1994). “It is not misconduct ... for a prosecutor to argue that the evidence does not support the defense theory.” *Id.* “Allegedly improper arguments should be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *Id.*, 125 Wn.2d at 85-86.

Defense counsel’s closing argument told a tale of terror.<sup>21</sup> Threatened downstairs a couple of hours earlier<sup>22</sup> by a violent<sup>23</sup> Brandon Zomalt with a pistol thrust in his face and a threat made on his life, Defendant sheltered upstairs for a couple hours. 10 VRP 1597. When the opportunity presented itself, he went downstairs, seized Brandon Zomalt’s pistol, and fled. 10 VRP 1598. At that moment the pistol was seized, Brandon Zomalt chased him. 10 VRP 1598. Defendant—fearful of his life<sup>24</sup> and devoid of intent to kill<sup>25</sup>—started shooting at Brandon Zomalt.

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<sup>21</sup> “...fear is what this case is all about.” 10 VRP 1590.

<sup>22</sup> 10 VRP 1597.

<sup>23</sup> 10 VRP 1593.

<sup>24</sup> 10 VRP 1590.

<sup>25</sup> 10 VRP 1591-92.

10 VRP 1598. Defendant fired his shots as quickly as he could fire them, “maybe three, five seconds, who knows.” 10 VRP 1599.

Defense counsel’s self defense argument was vulnerable.

Defendant unambiguously testified that he shot Mr. Zomalt when Mr. Zomalt was just beyond arm’s reach away. 9 VRP 1482. The medical examiner unambiguously testified that each of the three shots through Mr. Zomalt’s head was a contact wound caused by a gun touching Mr. Zomalt’s head. 6 VRP 903. Defendant testified that he shot from the stairs downward toward Mr. Zomalt, who was chasing him, at the foot of the stairs.<sup>26</sup> The medical examiner also testified that the first head shot was immediately incapacitating, and that it came in near the top of the head and came out through an eye. 6 VRP 900-01.

a. The “No Preemptive Strike” Rebuttal Argument was Fair.

In rebuttal, the prosecutor argued that “There’s no preemptive strike in self defense.” Before the prosecutor could answer the question begged by that statement (by identifying what cannot be preempted), Defendant objected. The trial judge properly overruled that objection. The prosecutor then put the statement in context:

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<sup>26</sup> Defendant testified that he “started running up the stairs” and that he “ran upstairs.” 9 VRP 1395, 1418. After the shot, defendant stood on the stairs with the gun in his hand. 9 VRP 1419. Defendant testified that he turned and fired. 9 VRP 1395.

There is no preemptive strike. And when you read your instructions and it talks about standing your ground in your own home, no duty to retreat, all that stuff is true, right, but it's all filtered through reasonably necessary. It doesn't matter if Mr. Zomalt was told to leave and didn't, you can't shoot him down. It doesn't matter if Mr. Boisselle hours earlier put a gun in your face, you can't take the gun and shoot him down. There has to be a threat of great personal injury, severe pain and injury or death before you can use deadly force, which is what this Defendant did. He used deadly force. And he told you from the witness stand, I pointed at him and I fired and fired and fired and fired and fired until he dropped.

10 VRP 1612. In the context of the argument actually made, the prosecutor argued to the jury that reasonable necessity cannot be preempted. This is the law. *State v. Brightman*, 155 Wn.2d at 503.

b. The “Over-Defend” Rebuttal Argument was Fair.

The prosecutor’s rebuttal argument suggested that even if everything Defendant said was true, the five shots to Mr. Zomalt were not reasonable and that Defendant “over-defended.” 10 VRP 1616-17. The prosecutor argued that two shots might be reasonable, but that Defendant didn’t get to shoot five. *Id.* Given the facts of this case, this was a reasonable argument, based on the evidence presented and defense counsel’s argument. The State’s challenged rebuttal argument should be examined in the context of the entire rebuttal argument. Immediately before the challenged argument, the prosecutor argued:

Actual danger isn't necessary, as long as you reasonably perceived the danger. And see, here's how the law of self-defense works: There is a subjective standard. There is an objective standard. The subjective standard is this: Did Michael Boisselle, himself, believe that he had to defend himself against Brandon Zomalt with deadly force? Did he believe it? That's the first question for you folks to ask. Did Michael Boisselle believe in it? Not just did he believe it. Did he reasonably believe it, based on everything he knew. Everything he knew is everything he told you from the witness stand about how bad of a guy Brandon Zomalt was, except for that there was no physical problem between them, no threat, no injury, no fight and no anything. That's Step 1. Defendant said he had to do it, but was that conclusion by him reasonable? The second one is an objective standard and the difference between the two is this: If a subjective standard was good enough, then Michael Boisselle saying I shot him in self-defense is the end of the discussion. We will take his word for it. Sorry, Brandon's dead, that's that. That's not how the law works. You 12 will determine objectively whether or not what he said was reasonable. Would a reasonable person do what Michael Boisselle did if that reasonable person knew everything Michael Boisselle knew. That's the collective voice saying whether or not Michael Boisselle had the right to defend himself with deadly force.

10 VRP 1615-16. The challenged argument was presented in a legally appropriate context. It was also presented in a factually appropriate manner.

Defendant asserted that Mr. Zomalt was not “down” until the last bullet was fired. 9 VRP 1414-15. Based on that assertion, Mr. Zomalt was either standing up, or going down, when the five bullets struck him. Perhaps the first two bullets might not have dropped Mr. Zomalt,<sup>27</sup> but the

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<sup>27</sup> The torso wound and the thigh wound. 6 VRP 867-69.

third bullet had to be (a) immediately incapacitating;<sup>28</sup> and (b) gory.<sup>29</sup> That third bullet entered Mr. Zomalt from behind and exited through his eye. 6 VRP 900. The prosecutor's argument that two more—undoubtedly incapacitating—very close together—into the side of the head—shots were unreasonable and not self defense was fair argument given the evidence presented. 6 VRP 900, 922.

The “over defend” argument was fair rebuttal, given the facts of this case and the context in which it was presented.

c. Defendant's Challenges to the State's Argument Are Not Well Taken.

Defendant argues “An individual does not have to wait until he is injured to protect himself.” Appellant's Brief at 74. This is not a correct statement of the law. Sometimes, under the facts of a particular case, the individual may not have to wait until he is injured to protect himself; other times he must wait until he is injured to protect himself. For instance, if a person is walking down the street and another person shoots him in the torso, seemingly out of the blue, then the person attacked necessarily must wait until that person is injured before he can protect himself. Pre-emptive violence is not permitted in such a circumstance. On the other

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<sup>28</sup> 6 VRP 901.

<sup>29</sup> The bullet went in through the back of the head and came out through the right eye. 6 VRP 900. The heart pumps a lot of blood through the brain. 6 VRP 915.

hand, if a person is walking down the street and another person runs at him, gun in hand, screaming “I’m going to shoot you,” then the person does not need to wait until he is injured before he can protect himself. It all depends upon the facts of the particular case. More specifically, it all depends upon (among other factors) whether the person “employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the Defendant, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.” Instruction 22, CP 119.

In this case, the prosecutor was not, as Defendant asserts, trying to discredit Defendant’s self-defense claim “based solely on the number of shots fired.” Appellant’s Brief at 75. The prosecutor was trying to discredit Defendant’s self-defense claim based on Defendant’s credibility problems,<sup>30</sup> the scientific impossibility of his claim that he shot the victim from a greater than arm’s length distance,<sup>31</sup> *as well as* the number of shots involved—and the necessary immediately incapacitating consequences of each of the three contact wound shots to Mr. Zomalt’s head. These matters all bore heavily both upon the issue of reasonable necessity and upon just how the facts and circumstances *really* appeared to Defendant at

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<sup>30</sup> The prosecutor argued that medical evidence contradicted defendant’s claim that Brandon Zomalt was very drunk that day. 10 VRP 1613-14.

<sup>31</sup> 10 VRP 1563.

the time of and prior to each shot fired. CP 119. To reframe this in the language of the state's rebuttal argument: Even if the Defendant was justified in the preemptive thigh shot, the preemptive torso shot, and the preemptive and completely incapacitating gory contact head shot from behind, the two pistol shots right up against Mr. Zomalt's left temple were just too much. Given the facts of this case, such argument was appropriate.

D. CONCLUSION

The deputies were well within both the routine health and safety check and emergency aid aspects of their community caretaking functions when they entered the duplex. First, the officers subjectively believed that either Mike or Zomalt were injured or possibly dead and in need of health or safety assistance. Second, this belief was reasonable based on the anonymous call reporting a shooting and possible dead body, the foul odor of decaying flesh and garbage outside the garage, the unusual lack of any sign of life at the house over the past several days, Brandon Zomalt's association with the home and connection to a missing person case, and their inability to locate or contact Mike or Zomalt. The deputies also had a reasonable basis for associating the need for assistance with the duplex based on the anonymous call. All of this information, together, indicated that someone was injured or dead inside the duplex and in need of

assistance. The trial court correctly found that the deputies acted within their community caretaking functions. The Court should affirm Defendant's conviction.

The jury instructions provided in this case stated the law and afforded Defendant an opportunity to present his theory of the case. Alternatively, Defendant's proposed defense of felony jury instructions were both untimely and prejudicial to the state.

The prosecutor's closing argument was fair rebuttal.

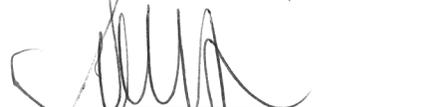
The judgment below should be affirmed.

DATED: August 17, 2017

MARK LINDQUIST  
Pierce County Prosecuting Attorney



MARK von WAHLDE  
Deputy Prosecuting Attorney  
WSB # 18373



Sanaa Nagi  
Rule 9 Legal Intern

*efile*

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*8/17/17* *[Signature]*

Date

Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**August 17, 2017 - 10:24 AM**

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**Appellate Court Case Title:** State of Washington, Respondent v Michael C. Boisselle, Jr., Appellant  
**Superior Court Case Number:** 14-1-03503-1

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